(9)

No. 98-470

In The

Supreme Court of the United States

October Term, 1998

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, and MARATHON PETROLEUM NORGE A/S,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Contrary to the heated rhetoric of the Respondents' Brief, Petitioner is not asking this Court to repeal the Madisonian Compromise. Instead we ask only that district courts have the freedom to decide for themselves which of two jurisdictional issues to consider first.

I. Respondents and the Amicus Ignore the Distinction Between Issues That Go to the Merits and Those That Do Not.

The difference between us is stark. Respondents read this Court's cases as having laid down a rule that "[i]n every federal case, the 'first question' necessarily is that of subject matter jurisdiction." (Resp. Br. 13) That is much too broad a statement. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 23, ___, 118 S. Ct. 1003, 1014 (1998), this Court reaffirmed "two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits." It distinguished, 118 S. Ct. at 1015 n.3, *Moor v. County of Alameda*, 411 U.S. 693 (1973), in which the Court had declined to decide the validity of pendent-party jurisdiction because it agreed with the district court's discretionary declination of pendent jurisdiction. That case, it said, "decided, not a merits question before a jurisdictional question, but a discretionary jurisdictional question before a nondiscretionary jurisdictional question." In the *Steel Co.* case, Justice Breyer, concurring in part, recognized that federal courts often and typically should decide standing questions at the outset of a case, but he said that he "would not make the ordinary sequence an absolute requirement." 118 S. Ct. at

1021. And Justice Stevens, concurring in the judgment, said: "We have routinely held that when presented with two jurisdictional questions, the Court may choose which one to answer first." 118 S. Ct. at 1022. He pointed to *Sierra Club v. Morton*, 405 U.S. 727 (1972), in which the Court found that petitioner lacked statutory standing and therefore did not decide whether it met the constitutional test for standing.

We submit that a correct understanding of the *Steel Co.* case, and of the law generally on this point, was stated by Judge Stephen F. Williams, writing for his court in *In re Papandreou*, 139 F.2d 247, 255 (D.C. Cir. 1998):

> What is beyond the power of courts lacking jurisdiction is adjudication, the act of deciding the case. * * * Thus, although subject-matter jurisdiction is special for many purposes (*e.g.*, the duty of courts to bring it up on their own), a court that dismisses on other non-merits grounds such as forum non conveniens and personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying *Mansfield* and *Steel Company*.

Respondents seize upon the fact that federal subject-matter jurisdiction is a "threshold consideration." (Resp. Br. 10) So it is – but Respondents read far too much into this. In the habeas-corpus area, an argument that a claim is barred by the *Teague* rule is a "threshold matter," but ordinarily it is not to be examined until procedural bars to habeas corpus have been resolved.

> It was speculated at oral argument that the Court of Appeals may have resolved the *Teague* issue without first considering procedural bar because our opinions have stated that the *Teague* retroactivity issue is to be made as a "threshold matter." * * * That simply means, however, that the *Teague* issue should be addressed "before considering the merits of [a] claim" 510 U.S., at 389. It does not mean that the *Teague* inquiry is antecedent to consideration of the general prerequisites for federal habeas corpus which are unrelated to the merits of the particular claim – such as the requirement that the petitioner be "in custody," see 28 U.S.C. § 2254(a), or that the state-court judgment not be based on an independent and adequate state ground.

Lambrix v. Singletary, 520 U.S. 518, ___, 117 S. Ct. 1517, 1523 (1997). In *Lambrix*, while saying that these procedural questions are ordinarily to be considered first, the Court made it clear that it was leaving discretion about this to the lower courts and that judicial economy should be a primary consideration.

> We do not mean to suggest that the procedural bar issue must invariably be resolved first; only that it ordinarily should be. Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural bar issue involved complicated issues of state law.

117 S. Ct. at 1523. And Justice O'Connor, dissenting, recognized that there might be exceptions to the rule that the procedural-bar issue should be resolved first. "One case might be where the procedural bar issue is excessively complicated, but the *Teague* issue can be easily resolved." 117 S. Ct. at 1534.

Other recent decisions support the view that a court may choose on which preliminary issue to decide a case so long as it does not go to the merits of the case. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, ___, 117 S. Ct. 2231, 2244 (1997), objectors to the settlement of a class action argued that there was no case or controversy, that certain of the claimants lacked standing to sue, and that those claimants did not meet the amount-in-controversy requirement. But the Court did not resolve these objections, two of them constitutional and one statutory, to subject-matter jurisdiction. "We agree that '[t]he class certification issues are dispositive,' * * * ; because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first * * *." And in *Arizonans for Official English v. Arizona*, 520 U.S. 43, ___, 117 S. Ct. 1055, 1068 (1997), the Court had "grave doubts" whether two of the parties had standing to pursue appellate review. Instead it chose to decide whether the originating plaintiff still had a case to pursue. The Court said that it could do this because both the standing and the mootness issues go to whether the courts have Article III jurisdiction, "not to the merits of the case." 117 S. Ct. at 1068.

In *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), the district court awarded Rule 11 sanctions against the plaintiff for conduct unrelated to the plaintiff's challenge to removal jurisdiction. The Fifth Circuit ultimately held that removal jurisdiction was lacking and that a remand to state court was required, but it nevertheless upheld the award of sanctions. This Court affirmed, rejecting the argument that the imposition of sanctions ran afoul of

Article III given the absence of subject-matter jurisdiction. It explained:

> Such an order implicates no constitutional concern because it 'does not signify a district court's assessment of the legal merits of the complaint.' It therefore does not raise the issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction.

503 U.S. at 138 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990)). Similarly, the district court's dismissal of this case for lack of personal jurisdiction "does not signify a district court's assessment of the legal merits of the complaint," and it does not "raise the issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction."

Steel Co. confirms that the "separation of powers" issue relied on so heavily by the Respondents and the Amicus is implicated only when a federal district court exceeds its powers. In *Steel Co.*, this Court declined to endorse the doctrine of "hypothetical jurisdiction," *i.e.*, the practice of assuming jurisdiction for the purpose of deciding the merits, "because it carries the courts beyond the bounds of authorized judicial action and thus offends federal principles of separation of powers." 118 S. Ct. at 1012. The Court noted that "for a court to pronounce upon the meaning or constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." 118 S. Ct. at 1016.

Thus, under *Steel Co.*, the critical question in this case is whether a district court has the power to dismiss for

lack of personal jurisdiction without reaching subject-matter jurisdiction first. Because a court always has jurisdiction to determine its own jurisdiction, the indisputable answer to this question is yes. Under *Steel Co.*, the district court's dismissal for lack of personal jurisdiction is not "beyond the bounds of authorized judicial action," it is not "ultra vires," and it therefore does not "offend[ ] fundamental principles of separation of powers." 118 S. Ct. at 1012, 1016.

In this case the motion to dismiss for want of personal jurisdiction raised a constitutional issue.[1] The motion to remand for want of subject-matter jurisdiction raised issues largely statutory in nature, though perhaps with constitutional overtones.[2] As all of the cases just cited show, the court has discretion as to which preliminary issue to take up first. The limitation is that the court must be sure it has jurisdiction before it goes to the merits of the case. There is all the more reason to consider some other issue before getting to subject-matter jurisdiction when that other issue is personal jurisdiction, itself a

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[1] Respondents make no mention of *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 381-82 (1937). As we have shown (Pet. Br. 13-14), that case, building on cases going back to 1901, holds that personal jurisdiction of a defendant is "an essential element" of a federal court's jurisdiction.

[2] The claim of fraudulent joinder went to the requirement of complete diversity, which is a statutory rule. The dispute about arbitration went to whether 9 U.S.C. § 205 was applicable. The claim that the questions of foreign relations are part of federal common law goes in the first instance to the meaning of 28 U.S.C. § 1331, although the scope of the constitutional grant of "arising under" jurisdiction would be in the background.

"nondiscretionary jurisdictional question" and an essential element of the court's power to decide the case.

II. The Removal Statutes Do Not Require the Fifth Circuit's Mandatory Rule.

Respondents seize on language about the removal statutes being strictly construed and all doubts resolved in favor of remand. They argue from this that if the question of subject-matter jurisdiction is difficult, the district court should remand for that reason alone, rather than dismissing for want of personal jurisdiction. (Resp. Br. 17-19) But jurisdiction on removal is not some sort of second-class jurisdiction. Mere difficulty in deciding whether the requirements for removal have been met has never been thought in itself to be a ground for remand. "[S]ince the remand to a state court is not a reviewable order, the federal court should be cautious about directing remand too easily lest it erroneously deprive a removing defendant of the statutory right to a federal forum." 14B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3721, at pp. 351-52 (1998). This Court emphasized that point long ago:

> While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.

Wecker v. National Enameling & Stamping Co., 204 U.S. 176, 185-86 (1907). If the rule were as Respondents contend, it would hardly be possible for the Court to uphold removal in a case such as *American National Red Cross v. S.G.*, 505 U.S. 247 (1992). The five Justices in the majority in that case expressly found that the subject-matter jurisdiction question raised by the case was "difficult," 505 U.S. at 250, and, on Respondents' argument, that conclusion should have required remand. The difficulty is emphasized by the fact that four Justices would have held that the case was not removable. Yet the majority resolved the "difficult" subject-matter jurisdiction question by holding that federal jurisdiction existed and that removal of the case was proper. 505 U.S. at 250-65.

In attempting to justify the Fifth Circuit's mandatory rule, Respondents rely on 28 U.S.C. § 1447(c), which provides that a case shall be remanded "[i]f at any time before final judgment it appears that the district court lacks subject-matter jurisdiction * * * ," and on 28 U.S.C. § 1447(d), which provides that removal orders are not appealable if based on lack of subject-matter jurisdiction. However, the district court in this case never concluded that it lacked subject-matter jurisdiction; it elected to avoid the questions raised by the subject-matter jurisdiction challenge, some of which were difficult, in favor of an easier disposition of the case for lack of personal jurisdiction. Nothing in the removal statutes obligates a district court to remand a case to state court unless and until the district court determines that subject-matter jurisdiction is lacking.

III. A Defendant Is Not Required to Waive its Removal Rights in Order to Test Personal Jurisdiction.

Respondents and the Amicus assert that it is more efficient for defendants in the position of Ruhrgas to waive their rights to remove the case to federal court and to assert their personal-jurisdiction defense in state court. (Resp. Br. 26, Amicus Br. 12-14) This argument, which again denigrates the defendant's statutory right of removal, ignores the reality of complex commercial litigation. Foreign defendants, such as Ruhrgas, faced with a purposefully crafted state-court lawsuit by a local plaintiff seeking substantial damages, have 30 days to decide whether to seek removal of the case. Often, as in this case, the plaintiff's petition sheds little light on the plaintiff's asserted basis for jurisdiction in the forum state. As in this case, the deposition of the plaintiff's own witnesses may confirm the absence of jurisdiction in the forum state, making the personal-jurisdiction question an easy one for the district court to resolve. But a defendant, believing in good faith that the federal court has subject-matter jurisdiction of the case, cannot wait until the state court has decided the question of personal jurisdiction. A defendant must remove within 30 days or not at all. A decision by the state court that it lacks personal jurisdiction would of course dispose of the case, but if the state court should hold that personal jurisdiction exists, this would not start a new 30-day period running under the second paragraph of 28 U.S.C. § 1446(b). It is for reasons of this kind that a long line of cases has held that a defendant need not follow the course that Respondents and Amicus suggest. By removing a case to federal court,

a defendant does not waive its objection to personal jurisdiction. *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929); *Arizona v. Manypenny*, 451 U.S. 232, 242 n.17 (1981). A defendant has "the same right to invoke the decision of the United States court on the validity of the prior service that he has to ask its judgment on the merits." *General Investment Co. v. Lake Shore & M. S. R. Co.*, 260 U.S. 261, 268-69 (1922).

The Amicus says that "[t]he Fifth Circuit restricted its ruling to removed cases * * *." (Amicus Br. 14) This is not entirely correct. The Fifth Circuit explicitly left open whether its mechanical rule that subject-matter jurisdiction must always be resolved before considering personal jurisdiction would apply to cases commenced in federal court. It said that those cases "may raise other issues that we do not face in the instant case, so any opinion as to those issues would, as a consequence, be premature." 145 F.3d at 225, J.A. 501. The dissenters thought that there is no principled way to confine the ruling to removed cases, 145 F.3d at 230 n.5, J.A. 514, and we have set out in our initial submission our similar doubts.[3] (Pet. Br. 26 n.8) The attempt of Amicus to find a principled basis for limiting the rule adopted below to removed cases (Amicus Br. 10-14) reinforces those doubts. Amicus argues that the only harm in passing on subject-matter jurisdiction first is that a defendant may be forced to litigate those issues even when it is not subject to personal jurisdiction. In a removed case, Amicus argues, a

[3] Respondents go beyond our expression of doubt. They say flatly that in "every federal case" subject-matter jurisdiction must be passed on before any other issue. (Resp. Br. 13)

defendant can avoid this. A defendant can "simply raise the alleged absence of personal jurisdiction in state court instead of choosing to remove." (Amicus Br. 12) But we have shown in the preceding paragraph why a defendant is not required to yield its statutory right to remove.

IV. Respondents' Predictions of Inefficiency and Abuse of a Discretionary Rule Are Unwarranted.

Respondents assert that "the costs of a 'discretionary,' multi-factor approach clearly exceed the benefits." (Resp. Br. 25) Apparently, Respondents contend that the analysis of federalism and judicial-efficiency considerations under a discretionary rule constitutes an inefficient use of judicial resources. Respondents' argument ignores the fact that the discretionary rule gives the district courts the *option* (but not the obligation) to analyze the federalism and efficiency considerations presented by a particular case[4] in order to avoid difficult questions of

[4] In this case, the federalism considerations are minimal. Although Respondents assert that "state courts invariably have a special interest in interpreting and applying their own long-arm statutes," (Resp. Br. 23 n.33) the personal-jurisdiction issue presented to the district court in this case did not involve the interpretation or application of the Texas long-arm statute. Texas has interpreted its long-arm statute to extend to the full extent of due process, and the personal-jurisdiction question therefore simply was a question of federal due process. Although the state courts have the equal obligation to guard, enforce, and protect the rights granted and secured by the United States Constitution, the states have no special interest in interpreting and applying the United States Constitution. Furthermore, this is not a case in which a defendant has contrived on frivolous grounds to have the personal-

subject-matter jurisdiction. This flexibility enables the federal district courts to manage their heavy dockets in the most efficient manner.

Respondents also argue that delays in this case demonstrate the inefficiency of a discretionary rule. This case, however, clearly illustrates the efficiency inherent in the discretionary rule. The district court authorized limited discovery on all jurisdiction issues (both subject-matter and personal), and based on the submissions of the parties, concluded that the personal-jurisdiction issue was resolved easily in Ruhrgas's favor. As a result, the case was dismissed just a few months after it was filed. The seven Fifth Circuit Judges who looked at the personal-jurisdiction question agreed that it "could be resolved relatively easily in Ruhrgas's favor."[5] 145 F.3d at 233, J.A. 523. But for the Fifth Circuit majority's imposition of a mandatory rule requiring that subject-matter jurisdiction be addressed first in every removed case, this case would have been over long ago.

Respondents also assert that the discretionary rule proposed by Ruhrgas would result in "a new era of forum shopping."[6] (Resp. Br. 29) This Court rejected a virtually

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jurisdiction issue decided by a wholly inappropriate forum. Ruhrgas's notice of removal presented substantial questions of subject-matter jurisdiction. Under these circumstances, federalism concerns are "minimized." *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-67 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994).

[5] The other nine Fifth Circuit Judges did not address the personal-jurisdiction question.

[6] That Respondents should even mention "forum shopping" brings to mind President Franklin Roosevelt's remark, when the Republicans were speaking of "the Roosevelt depression," that he had been brought up "never to mention 'rope' in the house of a man who has been hanged." In order to bring this case in a Texas state court and try to keep it there, the Marathon group did not include in the suit the only real party in interest, MPCN. They named Norge as a plaintiff, though Norge assigned all of its rights in the Heimdal Field to MPCN in the 1970s. They sued Ruhrgas alone, though it has only roughly a 25% interest under the HGSA, and omitted the state-owned buyers and the alleged co-conspirator Statoil, Norway's state-owned oil company, who could have removed the case to federal court under the Foreign Sovereign Immunities Act. And they brought suit in Texas though none of the alleged misconduct occurred in Texas and Ruhrgas is not subject to personal jurisdiction in any Texas court.

identical argument in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 77-78 (1996), in language which we quoted in our opening brief. (Pet. Br. 28)

The district judge, in the exercise of her discretion on how best to manage her caseload, addressed first the comparatively straight-forward issue of personal jurisdiction. Her holding on that issue eliminated the need to resolve the subject-matter questions presented by the motion to remand, some of which were complex and difficult to resolve. Nothing in the Constitution or the removal statutes bars the discretionary rule applied by the district court in this case. Given the obvious lack of personal jurisdiction over Ruhrgas, the district court's dismissal of this case should be affirmed or, alternatively, the Fifth Circuit's judgment should be reversed and the

case remanded to the Fifth Circuit for further proceedings.

Respectfully submitted,

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